IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 4:05-CV-329-GKF-PJC**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S REPLY MEMORANDUM IN FURTHER SUPPORT OF MOTION IN LIMINE TO EXCLUDE PORTIONS OF DEFENDANTS' "EXPERT REPORT OF WILLIAM H. DESVOUSGES AND GORDON C. RAUSSER" AND RELATED TESTIMONY (DKT. #2270)

Plaintiff, the State of Oklahoma ("the State"), hereby submits this reply memorandum in further support of its Motion in Limine to Exclude Portions of Defendants' "Expert Report of William H. Desvousges and Gordon C. Rausser" ("State's Motion") (Dkt. #2270).

I. Introduction

In their Response to the State's Motion, Defendants attempt to dismiss the serious challenges raised to various opinions of Defendants' experts Desvousges and Rausser (collectively, "D/R"), calling them "quibbles." Defendants wish to ignore that these so-called "quibbles" challenge the fundamental underpinnings of the models presented in the D/R Report and other opinions therein. The issues raised by the State are matters of methodology, and as shown in the State's Motion, D/R's opinions do not follow sound methodology as reflected in the literature; therefore, they provide no useful information to the Court and should be excluded.

II. Argument

A. D/R's Recreation Model and Any Related Testimony Should Be Excluded

In their Report, D/R stated:

> Our analysis indicates that none of the indicators for water clarity were found to significantly predict visitation. Thus, aggregate visitation for the COE sites for the years 2000 to 2007 was not impacted by variation in water quality, as measured by water clarity levels. . . . These results provide further support for our conclusion that recreation at Tenkiller Lake has not been impacted by changes in water quality and that recreators have not experienced any potential losses from alleged injuries attributable to increased phosphorous loadings from the application of poultry litter.

(Dkt. #2270-2, D/R Report, p. 18.) The State pointed out that D/R's finding that "none of the indicators for water clarity were found to significantly predict visitation" is erroneous and arises from three data errors committed by D/R. (Dkt. #2270, State's Mot., pp. 4-7.) In their June 30 errata, D/R concede that correcting for any of those errors reverses the finding of their regression analysis: "Our revised analysis indicates that mean water clarity significantly affects visitation.

Sites with clearer water have higher levels of visitation."[1] (Dkt. #2321-2, D/R Errata, p. 2.)

Notwithstanding the reversal of the factual underpinnings of D/R's conclusion, D/R attempt to maintain their conclusion by changing the basis of their argument. Their regression equation no longer supports their conclusion. Instead, they now assert that because, they found, Tenkiller Lake had the second highest level of water clarity in their sample of lakes during the period 2000 to 2007, and because visitation may have increased between 2000 and 2007, recreation there has not been impacted by reductions in water quality. (*Id.*, pp. 2-3.) The new argument is fallacious. The injury period is not limited to 2000-2007; increased phosphorous loadings and impairments of water quality started before 2000. Moreover, the issue before the Court involves what water quality levels in the IRW and Tenkiller Lake would be ***but for*** the phosphorus releases.

B. D/R's Hedonic Model and Any Related Testimony Should Be Excluded

In their Report, D/R propound two hypotheses relating to their hedonic model:

> Hypothesis (1): "Other things being equal, a home located on or near a lake that is aesthetically impaired [Tenkiller] would be expected to have a lower price than a similar house located [on or near a] lake that is not impaired [Eufaula]." (Dkt. #2270-2, D/R Report, p. 22.)
>
> Hypothesis (2): "[E]ven if Eufaula Lake and Tenkiller Lake were not comparable lakes, i.e., there are characteristics that differentiate the two lakes, we would expect that as the alleged phosphorus problem [at Tenkiller Lake] worsened over time, the relative effect on home prices would be negative." (*Id.*)

D/R test the two hypotheses and find that their data reject them. On the basis of that finding,

[1] Because it offers new opinions and veils a wholly revamped regression model with hundreds of changes made to data points, D/R's "Errata" is the subject of the State's Motion to Strike filed July 17, 2009, currently pending before the Court. (Dkt. #2354.) In any event, it is hard to conceive how Defendants can call these "minor inputting errors" (Defs.' Brf. at 9) when their correction, alone or in combination, *reverses* the statistical significance of the water clarity variable. And contrary to Defendants' representation that D/R's 2009 Errata "simply corrects the three coding errors pointed out to Dr. Desvosuges [sic] in his deposition" (*id.* at 9 n.3), D/R's revised model contains ***hundreds*** of changes to data. (*See* Dkt. #2354-6, Chapman Decl. ¶¶ 8, 9.)

they conclude that "there is no evidence, based on actual market transactions, that water quality has negatively impacted the valuation of single family homes on Tenkiller Lake."[2] (*Id.*, p. 25.)

With regard to hypothesis (1), the State established that D/R's hedonic model is not generally accepted in the economics literature on the impact of water quality on residential property values. (Dkt. #2270, State's Motion, pp. 8-13.) D/R deviate from the standard practice in the literature by *failing to control* for numerous factors besides water quality that would mask the impact of water quality differences between Tenkiller Lake and Lake Eufaula on property values in those two areas. D/R attempt to rebut this point by arguing: "The inclusion of variables that do not change over time are simply not relevant to the analysis performed by [D/R] because it evaluated house price movements over time" between the two lakes. (Defs.' Brf. at 12.) However, D/R provide no evidence on the stability of non-lake water quality attributes over the time period of interest. Because D/R's analysis of hypothesis (1) suffers from fundamental methodological flaws, it is unreliable and should be excluded.

Defendants now implicitly accept this criticism and abandon hypothesis (1), switching their focus to hypothesis (2). (*See* Defs.' Brf. at 12-14.) This hypothesis rests on the premise that water quality in Tenkiller Lake was growing worse during the period 1995-2008 (as opposed to having grown worse prior to 1995 while staying in roughly the same injured position in the more recent period). At a minimum, to test this hypothesis requires the presentation of positive evidence that characteristics of quality noticeable by homeowners, and salient to them, were *growing worse* at Tenkiller Lake *compared to* Lake Eufaula *during the period 1995 to 2008.* D/R made no such presentation in the D/R Report, and Defendants do not reference any evidence in their Response. Thus, D/R's hypothesis (2) is mere speculation and should be rejected.

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[2] Defendants' comparison of D/R's hedonic model to studies identified in the D/R Report (Defs.' Brf., p. 13) is unavailing for reasons stated in the State's Motion. (Dkt. #2270, p. 12.)

C. D/R's Critique of the Alum Scenario Is Not Relevant

Defendants argue that D/R's critiques of the CV survey's alum scenario "are relevant because [the State] must choose a restoration plan to calculate damages under CERCLA and the NRD regulations." (Defs.' Brf. at 15.) Defendants do not cite a specific provision or regulation that limits NRD to restoration costs. Remarkably, they cite *Ohio v. U.S. Dep't of Interior*, 880 F.2d 432 (D.C. Cir. 1989), in support of their assertion. (Defs.' Brf. at 15-16.) Yet, the D.C. Circuit Court of Appeals in *Ohio* expressly held that "the regulation limiting damages recoverable by government trustees for harmed natural resources to 'the lesser of' (a) the cost of restoring or replacing the equivalent of an injured resource or (b) the lost use value of the resource is directly contrary to the clearly expressed intent of Congress and is therefore invalid." 880 F.2d at 438. Indeed, CERCLA provides that the measure of damages "shall not be limited by" restoration costs. 42 U.S.C. § 9607(f)(1). *See* 73 Fed. Reg. 57259, 57265 (Oct. 2, 2008). As the court stated in *Ohio*: "This provision obviously reflects Congress' apparent concern that its restorative purpose for imposing damages not be construed as making restoration cost a damages ceiling." 880 F.2d at 445-46. Thus, Defendants turn congressional intent on its head when they state that "[t]he use of anything other than the actual restoration plan to calculate damages flies in the face of Congressional intent." (Defs.' Brf. at 15.)

D. D/R's Challenged Opinions That Critique the CV Study Should Be Excluded

1. *D/R's Opinions Regarding the CV Study Are the Proper Subject of a Rule 702 Challenge*

With regard to the various challenged D/R opinions on the CV survey, Defendants first suggest that D/R may, because of their experience, offer opinions that otherwise sound in speculation. (Defs.' Brf. at 16.) Such opinions do not satisfy *Daubert* and should be excluded. *Ralston v. Smith & Nephew Richards, Inc.*, 275 F.3d 965, 970 (10th Cir. 2001) ("merely

possessing a medical degree is not sufficient to permit a physician to testify concerning any medical-related issue").

With specific regard to D/R's "opinion" that CV was chosen because the Stratus team was "unhappy" with the results of two preliminary, non-representative, surveys – the intercept study and the telephone survey ("preliminary studies") – such opinion is based purely on speculation. There is simply nothing "expert" about it. Moreover, Defendants' reliance on the preliminary studies to extrapolate opinions to the Oklahoma public is wholly improper. Neither study was designed or intended to elicit the same information as the CV Study, which *was* so designed to produce a reliable damages estimate for the Oklahoma public.[3]

2. *D/R's Opinions on "Scope" Should Be Excluded*

D/R's "scope" test relies on an assessment of whether confidence intervals overlap. The State appropriately criticizes this because it is not supported by the peer-reviewed literature and is not a proper statistical test. (Dkt. #2270, State's Motion, p. 17.) Defendants respond, ineffectually, that the NOAA Panel "does not require any particular method to measure the sensitivity" to scope. (Defs.' Brf. at 19.) This is, however, a simple matter of statistics.

Two separate surveys were administered to two separate samples of respondents (i.e., the base and the scope samples); from each set of responses, a measure of mean willingness-to-pay ("WTP") was estimated (i.e., lower-bound mean WTP). The D/R scope test examines whether the two means are different for an artificially generated experiment where the base sample size was reduced by half. The appropriate method in the statistics literature for testing whether two means differ is a "t-test." (*See, e.g.*, Ex. A, Alexander Mood, et al., Introduction to the Theory of Statistics 432-35 (3d ed. 1974).) Defendants use a different test, claiming that "[s]ufficiently

[3] Because Defendants have, since February 2009, repeatedly misrepresented the preliminary studies, they will be the subject of a motion *in limine*.

overlapping confidence intervals are a sign that a contingent valuation survey is not sensitive enough to measure the [WTP] for a given environmental harm."[4] (Defs.' Brf. at 19.) This is not a valid statistical test, however. (Dkt. #2321-4, Kanninen Dep. at 152:21-153:17.) In her Declaration, Dr. Kanninen describes how the t-test can be conducted for the D/R experiment and finds that D/R's "test" resulted in a false conclusion. (Dkt. #2270-5, ¶¶ 54-55.)

Moreover, researchers who rely on overlapping confidence intervals to test whether two means are different are acknowledged in the literature to "misunderstand confidence intervals," and their reliance on overlapping confidence intervals is described as "severely erroneous." (*See, e.g.*, Ex. B, Sarah Belia, et al., *Researchers Misunderstand Confidence Intervals and Standard Error Bars, in* 10 Psychol. Methods 389, 393 (2005); Ex. C, Nathaniel Schenker & Jane Gentleman, *On Judging the Significance of Differences by Examining the Overlap Between Confidence Intervals, in* 55 The American Statistician 182, 182-86 (Aug. 2001).) The Schenker article demonstrates that if the confidence intervals do not overlap, this is a correct rejection of the null hypothesis that the two means are equal; but, if the confidence intervals *do* overlap, this is *not* a correct indication that the hypothesis of equal means can be accepted. Either way, the t-test is the correct test for the type of "scope" experiment conducted by D/R, and the t-test finds that the CV Study passes D/R's "scope" test. D/R's opinions on scope should be excluded.

3. D/R's Opinions on the WTP Measure's Elasticity Should Be Excluded

Defendants' sole argument in response to the State's motion to exclude D/R's opinions

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[4] Defendants cite only the D/R Report and the Ojea and Loureiro ("Ojea") article. (Defs.' Brf. at 19.) Neither D/R nor the literature defines "sufficiently overlapping confidence intervals." D/R's reliance on the Ojea article is further misplaced. First, although Ojea compares confidence intervals, their conclusion is supported by the t-test (t= approx. 0.63) (generated using information in their Table 5 (Dkt. #2322-2, p. 245)). As shown in the State's Motion, however, D/R's claim is contradicted by the t-test. Second, Ojea's findings are based on a 79.4% overlap in confidence intervals, whereas D/R base their findings on a 4.5% overlap for their artificial base sample. This is an order-of-magnitude difference that cannot be treated as comparable, even if Ojea's treatment of overlapping confidence intervals were otherwise proper.

regarding elasticity is that they have now moved to strike Dr. Hanemann's and Dr. Kanninen's Declarations. (Defs.' Brf. at 20.) Defendants' Motion to Strike (Dkt. #2339) is without merit, and the State will file a response prior to the *Daubert* hearing. In brief, the State has properly offered the Declarations to explain why D/R's estimation of elasticities reflects unsound methodology.

E. D/R's Opinions on Econometric Analyses Are Fundamentally Flawed

Defendants claim that the State's challenge to D/R's opinions regarding the calculation of the average WTP and the use of the "ABERS" or "Turnbull" estimators[5] merely involves an "academic debate." (Defs.' Brf. at 20.) There is no *academic* debate here. The issue raised is central to whether Defendants' experts have relied on sound methodology to opine on the Stratus team's use of the ABERS estimator. Defendants' experts are simply unwilling to acknowledge the fundamental mathematical errors underlying all of their WTP estimates, which were calculated using the formula presented as the Turnbull approach in the non-peer-reviewed Haab-McConnell (2002) book excerpt – a formula that has been expressly disavowed by one of the book's authors, Professor Timothy Haab.[6] (Professor Haab's acknowledgement of the calculation error is Attachment 2 of Exhibit U to the State's Motion. (*See* Dkt. #2270-23.)) Simply put, D/R have not relied on sound methodology in critiquing the Stratus team's estimated average WTP, when the author of D/R's sole reference acknowledges a fundamental

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[5] The ABERS and Turnbull estimators are "non-parametric" estimators, meaning that they do not make assumptions about the distribution of WTP between bid amounts, i.e., data not observed. This characteristic makes them, as D/R admit, "more reliable" (Dkt. #2270-2, D/R Report, p. 91 n.55). And the ABERS estimator is a conservative approach. (Dkt. #2272-7, Hanemann Dep. at 107:7-108:3; Dkt. #2321-4, Kanninen Dep. at 89:1-21.)

[6] In light of this, that D/R have not withdrawn – or attempted to correct – their WTP estimates is remarkable. (Dkt. #2270-23, Attachment 2 (Haab stating that "the 2002 book treatment . . . unfortunately is not mathematically correct").) Defendants now even refer to the equation as "the Turnbull estimator, as interpreted by Haab and McConnell." (Defs.' Brf. at 22.)

mathematical error in the equation D/R used.[7]

Defendants argue thinly that the WTP estimate set forth in the CV Report does not follow basic economic principles. (Defs.' Brf. at 21.) Empirical data are, however, always subject to sampling variation, about which economic theory is silent. The sampling variability vanishes in an infinitely large sample, but is present in any finite sample. Hence, one has to allow for sampling variation when testing a theoretical restriction in any data sample. When that is done for the Stratus CV survey, there is *no* violation of monotonicity – i.e., the non-monotonicity between $80 and $125 is not statistically significant, a fact that Defendants willfully overlook.

Moreover, neither Defendants' brief, nor pages 91-92 of the D/R Report (to which their brief cites in support of the argument), identify any literature supporting the notion that the presence of a statistically insignificant non-monotonicity renders the estimation of WTP meaningless. Indeed, the literature on empirical estimation from data reflects the possibility of non-monotonicity.[8] (*See, e.g.*, Dkt. #2270-27, Miriam Ayer, et al., *An Empirical Distribution Function for Sampling with Incomplete Information*, 26 Annals Mathematical Stat. 641, 642:24-26. (1955); Ex. D, B.J.T. Morgan, Analysis of Quantal Response Data 305, table in Ex. 7.1 (1992).) As this literature shows, sampling variability is not unique to CV survey data.

Defendants argue further that "the Turnbull and ABERS produce different [WTP]

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[7] Defendants complain that Professor Haab's email (Dkt. #2270-23, Att. 2), in which he disavows the equation in his 2002 book, is neither a sworn statement nor a peer-reviewed article. (Defs.' Brf. at 20.) This is a non-starter, as the email is presented in the *Daubert* context, in which the Court may consider inadmissible material. *See Reed v. Smith & Nephew, Inc.*, 527 F. Supp. 2d 1336, 1347 (W.D. Okla. 2007). Moreover, there *is* a peer-reviewed article by the same authors, demonstrating the book's error. *See* T. Haab & K. McConnell, *Referendum Models and Negative Willingness to Pay: Alternative Solutions*, 32 J. Envtl. Econ. & Mgmt. 251-70 (1997).

[8] The literature on discrete-response CV *always imposes* monotonicity on the empirical data, either by using a parametric functional form or, in non-parametric estimation, by imposing monotonicity. (Dkt. #2272-7, Hanemann Dep. at 139:5-140:17.) Defendants' notion that non-monotonicity renders the Stratus WTP estimate suspect is meritless.

results." (Defs.' Brf. at 21 (emphasis omitted).) That is simply false. The only reason D/R arrive at a different WTP estimate using the "Turnbull" estimate is because of their reliance on the flawed equation in the 2002 book by Haab and McConnell. Applying the ABERS estimator and the mathematically correct Turnbull estimator, *as reflected in the peer-reviewed literature*, results in the same WTP estimate when the data are "single-bounded," as here. (*See* Dkt. #2270-23, Hanemann Decl. ¶¶ 16, 19, 23-24; Dkt. #2270-5, Kanninen Decl. ¶¶ 34, 37; Dkt. #2321-4, Kanninen Dep. at 136:3-23, 138:3-139:23; Dkt. #2272-7, Hanemann Dep. at 141:18-143:7.) Therefore, Defendants' argument that "[t]he fact that the decision between the two [estimators] makes a difference shows that contingent valuation as a methodology is inherently unreliable under *Daubert* . . . ." is simply made out of whole cloth. (Defs.' Brf. at 21-22.) Moreover, Defendants claim that "[t]hese are highly technical issues on which there is no consensus." (*Id.* at 22.) In fact, there *is* a consensus among the State's experts, the author of the textbook relied on by D/R, and the peer-reviewed literature. Only D/R are at odds with that consensus. Thus, the Court should exclude D/R's opinions on the CV Report's WTP estimate.

F. D/R's Opinions Re: the Past Damages Report Should Be Excluded

Regarding the Past Damages Report, Defendants first argue that the Stratus team improperly chose to measure WTP for *non-use* values back in time. (Defs.' Brf. at 23.) Defendants' notion that non-use values should not be included in NRDA disregards the reality that non-use values are compensable, and that this argument has been rejected by, among others, DOI, NOAA, the NOAA Panel, and the D.C. Circuit Court of Appeals upon review of the NRDA regulations. (This argument is addressed more fully in the State's Response to Defendants' Motion to Exclude Stratus Experts. (*See* Dkt. #2320, pp. 3-5, 9-10.))

Defendants next had to *modify* D/R's opinions regarding using "benefits transfer" to

measure values back in time in response to the State's Motion. In D/R's Report, they opine: "Applying values backwards in time is not reliable. To our knowledge, the literature on benefits transfer contains no references to studies that extrapolate damages backward in time." (Dkt. #2270-3, D/R Report, p. 122.) The State's Motion, however, pointed out studies where benefits had been transferred back in time, including a study by Desvousges[9] and a peer-reviewed EPA Clean Air Act study. (Dkt. #2270, pp. 24-25.) In response, Defendants changed their story. (Defs.' Brf. at 23 ("Dr. Desvosuges [sic] only transferred use values, which are far more concrete than nonuse values, back in time.").) Defendants would now have us believe that what D/R meant to opine was that "applying values backward in time is not reliable *for non-use values, but is reliable for use values.*" Not only do they cite no literature for this, it constitutes a new opinion, providing a further basis for excluding D/R's opinions on the Past Damages Report.

Finally, Defendants miss the point of the State's reference to the EPA's Clean Air Act study (Dkt. #2270, pp. 24-25), which was simply pointed out as an example of a benefits transfer back in time, in response to Defendants' claim that "[t]he few studies that have considered the projection of [WTP] over time have all evaluated the use of [WTP] across future time periods, not the past." In any event, D/R's new argument can quickly be disposed of because benefits transfer has been applied *back in time* for *non-use values. E.g.*, EPA Study, *The Benefits and Costs of the Clean Air Act, 1970 to 1990* (1997), App. I, p. 17, *available at* http://www.epa.gov/air/sect812/copy.html (peer-reviewed transfer of visibility benefits).

III. Conclusion

Based on the foregoing, the State requests that the Court grant its Motion (Dkt. #2270).

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[9] In Desvousges' study, Desvousges and his co-authors took a 1998 value and transferred it back to 1981. (Dkt. #2270-28, pp. 15-16.) Here, the authors of the Past Damages Report took a 2008 value from the CV Study and transferred it back to 1981. (Dkt. #2320-16, p. 2.)

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I hereby certify that on this 21st day of July, 2009, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

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